United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-4192

Egon and Ruth Radvany
Docket No. 76-4192

The following items have been delivered to the United States Court of Appeals:

10 copies of each

1. Brief
2. Docket Entries
3. Tax Court Decision
4. P. 98-99 of "Your Federal Income Tax, 1973 Edition"
5. Green v. Commissioner of IRS
6. Aldridge v. Commissioner of IRS
7. O'Reilly v. Commissioner of IRS
8. Certificate of Service

Ruth Radvany
9/14/76

B
P/S

Brief and Appendix

UNITED STATES COURT OF APPEALS
FILED
SEP 15 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Egon and Ruth Radvany 9/12/76

v.

Commissioner of Internal Revenue

Docket No. 76-4192

Brief

We depended on the Internal Revenue Service Publication 17, "Your Federal Income Tax, 1973 Edition" P. 98 item 2) titled "Child care expenses." It does NOT list any limitations due to income.

From the Tax Court transcript, you can see that Judge Tannenwald at first thought that the facts were not as I had stated them. However, later he realized that I had followed the instructions as given in the IRS bulletin. (Pages 6-8.)

The auditors repeatedly pull out the same publication to prove their points. Consequently, if I am to be treated fairly, I should be able to do likewise. The front of "Your Federal Income Tax" states "Explanations and examples in 'Your Federal Income Tax' reflect the OFFICIAL (emphasis added) interpretation by the Internal Revenue Service of tax laws enacted by Congress, regulations promulgated by the Treasury, and pertinent court decisions." If it were otherwise, it seems to me, the book should not be sold by the government. Furthermore, while preparing for the Tax Court hearing, I noticed that the instructions which come with the federal tax forms constantly suggest that the taxpayer obtain publications published by the IRS.

From the above, does it not follow that the taxpayer should be able to depend on these government publications and not be penalized by having to pay not only additional taxes BUT INTEREST ON THE TAX AS WELL?

I consider that IRS harassed me by insisting that I come to several conferences even though, once again, their own publication L87 states that I may "request a conference with a member of our conference staff." Mr. Hengler refused

to allow me to do so unless he personally had "certified the case as closed" (4/8/74). I had already seen auditors Fischer and Gitto. When I met with Mr. Michael Starr, he told me that even if I found a precedent in a previous Tax Court ruling, it would have no bearing on my case as each ruling is for that case only. IN SPITE OF HIS OWN WORDS, he sent me a Tax Court ruling which he felt was a ruling for him and against me. That ruling, Green v. Comm. of IRS, stated on P.458 "... even if 'Your Federal Income Tax' were construed to permit deduction... ." I am NOT construing as this means interpreting according to the "Concise Oxford Dictionary." I am stating what is listed as FACT, not even an example. Judge Tannenwald then also quoted this quite irrelevant case.

When I told Mr. Starr that I could see absolutely no lgic or law which required IRS to charge us interest, he agreed that that was unfair. He offered to acdept an affidavit for the amount of the interest which would cover some business expemses IRS had disallowed because I had no substantiation for them. Mr. Starr said that IRS could not disallow the tax. Only a court could do so which is why we appealed.

Mr. Paul Vignone of the IRS with whom I spoke at IRS and who was present at the Tax Court hearing, also sent me some Tax Court rulings which were also irrelevant to my case. The O'reilly case on p. 1153 states "Reliance on IRS employee's statement... . They were not entitled to rely on a statement made by an IRS employee over the telephone that such costs were deductible." This has absolutely nothing to do with this case as I never claimed anything having to do with oral statements and CERTAINLY not over the telephone.

Mr. Vignone also sent me the Aldridge case. This seems to have only one reference to "Your Federal Income Tax" on p. 482. This refers to "interpretation of examples" by the petitioners. This case also does not

have any bearing on our case as we are NOT interpreting any examples. Judge Tannenwald also quotes this case.

I am not a lawyer and I fail to see the purpose of sending me several Tax Court cases which evidently are to convince me that I do not have a chance when, in fact, they have NOTHING to do with the facts of our case.

On October 25,1974 Mr. Herbert Weissman sent us a letter which started "The conference you requested... ." Since we had never requested that conference, I tried to call Mr. Weissman repeatedly on October 29th and 30th. When I finally reached him, he informed me that another conferee (Finkelstein) was listening in on the conversation. When I objected to Mr. Principe, his superior, he told me that I could not have another conferee assigned. I had to work with Mr. Weissman. Obviously there was no point in doing this when for some unknown reason he did not trust me even before we spoke one word.

Is this considered fair treatment by the IRS?

Furthermore, I request a refund of $19.50 for the copies of "Your Federal Income Tax" which I have bought over the years and would like to suggest that the IRS take out the first sentence on the inside cover of the above publication and print instead a warning that it contains errors and that statements, NOT EXAMPLES, quoted from it will NOT be accepted as accurate by the IRS itself.

The mistake, if there was one, was made by the IRS in its official publication and we should not be required to pay for THEIR mistake.

In conclusion, I would like to quote Mrs. Gitto, one of the auditors, who said, "If you make a mistake, you must pay for it." I think that is fair enough. However, I do not wish to pay when I have not made a mistake according to the official publication of the very governmental agency which now claims it is NOT responsible for its own publication.

Consequently, I request the Court to rule that

we need NOT pay EITHER the tax OR the interest on it. Certainly it would be most unfair to ask us to pay interest for an error which THE GOVERNMENT ADMITS IT MADE since the publication is crystal clear and we filed our tax forms accordingly.

UNITED STATES COURT OF APPEALS
FILED
AUG 26 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

EGON RADVANY AND RUTH RADVANY,
Petitioners
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Tax Court Docket No. 75[illegible]-74

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76-4119

* * * * * * * * *

The following exhibits are separately certified:
1-A and 2-B attached to stipulation of facts;
3-C admitted in evidence.

UNITED STATES TAX COURT

WASHINGTON

EGON RADVANY and RUTH RADVANY, Petitioners,	)	
v.	)	Docket No. 7560-74
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed May 27, 1976, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the taxable year 1972 in the amount of $831.39.

Theodore Tannenwald Jr.
Judge

ENTERED MAY 27 1976
Enter:

SERVED MAY 27 1976

11

this caption and also as *medical expenses.* These may not be included in both computations. If you include the expenses in your employment-related computation and are allowed less than the total expense because of the $400 a month maximum, you may add the remainder to your medical expenses before applying the percentage exclusion. However, if you include them first as a medical expense, you may not include the amount excluded on the medical schedule in your employment-related expense computation because in that circumstance you will have used the entire amount in the medical expense computation.

Gainful employment. This includes working for others, employment in your own business or partnership and the active search for gainful employment. Unpaid volunteer work or work for a nominal salary does not qualify. Also expenses that exceed income for the period of dependent care would be questionable as to whether the purpose is to enable the taxpayer to be ***gainfully*** employed.

The period of gainful employment must correspond to the months in which the expenses were incurred. An allocation on a daily basis may be required when an expense period includes a period when neither gainful employment nor active search for such employment is involved.

Substantially full time employment is considered to be employment for at least ¾ of the normal or customary work week or the equivalent during a calendar month.

Household Maintenance.

You are considered to have maintained a household if you (and your husband, or wife, if married and living together) provided more than half the maintenance cost during the tax year or lesser period.

Maintenance expenses for the mutual benefit of the occupants of the household normally include items such as property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on the premises.

Excluded from maintenance expenses are items such as clothing, education, medical treatment, vacation, life insurance, transportation (but see *Child care expenses* below), mortgage principal or property purchase, permanent improvements or betterments, and replacement. As an example, the cost of replacing for a water heater is not considered a maintenance expense, but the cost of repairing a water heater is includible as a maintenance expense.

Qualifying Individuals

Your household must be your (and your husband's or wife's, if married) ***principal abode*** and must include one or more qualifying individuals. Individuals included are:

1) Your dependent under the age of 15 for whom you are entitled to a personal exemption.
2) Your dependent, age 15 or older, who is physically or mentally incapable of self-care.
3) Your husband or wife who is physically or mentally incapable of self-care.

Physical or mental incapacity is not to be presumed because of a defect; it must be disabling. A person whose physical or mental deficiency renders him incapable of dressing himself or providing for his hygienic or nutritional needs will ordinarily be considered as incapable of self care. An individual who, because of mental defects, requires constant attention to avoid his injuring himself or others is considered incapable of self-care.

Qualification of a dependent or disabled husband or wife is determined on a ***daily basis*** when the disability lasts for less than a calendar month. For example, if a dependent(or husband, or wife) for whom you have incurred employment related expenses, ceases to be a qualifying individual on September 16, you may include your employment related expenses through September 15 in your computation.

Employment-related expenses may include:

1) ***Household expenses*** paid for ordinary and usual household services performed in and about the home and necessary to the operation of the taxpayer's home and for the well-being and protection of one or more qualifying individuals. The services of a housekeeper, maid, or cook will ordinarily be considered as necessary to the operation of the household. Payment for services of a chauffeur or gardener is not included.

In instances of ***dual capacity,*** some portion of services in the home and the remainder as other than houshold's services, the expenses must be apportioned (unless minimal or insignificant) to exclude the payments for other than household services.

2) ***Child care expenses*** are not confined to services performed within your household, but see *Limitations,* below. Expenses for nursery school or day care for preschool children may be included if paid to enable you to be gainfully employed. Benefits incident to the care (food, education, etc.) are not child care expenses but, if a payment covers ***incidental benefits*** inseparably a part of the care, the entire cost will ordinarily be considered as being for child care. However, benefits will not be considered as inseparable if the expense includes ***education*** in the first or higher grade level; such expenses must be apportioned between the cost of care for the child and the cost of education.

Necessary ***transportation*** costs for the child between the taxpayer's household and the care location may be included as child care expenses.

Limitations. Although the maximum deduction for any calendar month is $400, expenses for the care of your dependent children under the age of 15, if performed outside your household, are limited for each month to:

$200 a month for one child,
$300 a month for two children, or
$400 a month for three or more children.
See Example 1, below.

Expenses for child care services performed within your household are not limited as above but are subject to the $400 maximum deduction. They may be combined with household duties such as cooking, cleaning, etc., without apportionment.

A period of less than a calendar month should be treated as though it were a whole calendar month.

3) ***Dependent care*** expenses must be for services performed in your home to enable you to be gainfully employed. If your dependent is age 15 or older, total dependent care expense for each month ***must be reduced*** by the following, in the sequence shown:

A) ***Dependent's excess adjusted gross income and disability payments,*** if any. Add dependent's adjusted gross income for the year ***and*** any non-taxable disability payments (except gifts) he received and deduct $750 to arrive at dependent's excess. Allocate the appropriate portion of the excess to the expense month and subtract it from your expense for that month (See Example 3, below).

B) ***Monthly maximum.*** Substitute the $400 maximum if your remainder in A, above, exceeds that amount.

C) ***Your excess adjusted gross income.*** Subtract $18,000 from your adjusted gross income (combined income of husband and wife) for the year to arrive at your excess, if any. As one-half the excess must be deducted, the excess for a calendar year should be divided by 24 to find the amount of the reduction to the expense for one month. Subtract this figure from the amount you show in B, above, to find your allowable deduction for the month.

4) ***Incapacitated husband or wife care*** payments must be for services performed in your home to enable you to be gainfully employed. Your total husband or wife care ex-

pense for each month must be reduced by the following, in the sequence shown:

A) ***Disability payments*** your husband or wife, received. Deduct any nontaxable disability payments (except gifts) your husband, or wife, received during the year that are attributable to the expense month from your total spouse care expense for the month. See Example 4, below.

B) ***Monthly maximum.*** Substitute the $400 maximum if your remainder in A above, exceeds that amount.

C) ***Your excess adjusted gross income.*** Subtract $18,000 from your adjusted gross income for the year (as shown on your joint income tax return) to arrive at your excess, if any. A taxpayer who was married for only part of the tax year need include the income of the husband, or wife, for only the period they were married when computing the adjusted gross income in excess of $18,000. Divide the excess by 24 to find the amount of the reduction to the expense for the month. Subtract this figure from the amount shown in B above, to find your allowable deduction for the month.

Nontaxable disabiltiy payments that reduce the amount of allowable expense for

Correction Notice

Publication 17,
Your Federal Income Tax,
1973 Edition

Item 1—

The computation in Example 3, starting in the center column on page 99, is incorrect. The following material, covering a different factual situation, should be substituted in its place.

Example 3: Disabled Dependent Care in Your Home

You are single, gainfully employed full time, maintain a household for yourself and your dependent father, and file Form 1040. You have adjusted gross income of less than $18,000 for the tax year and you itemize your deductions.

Your father was incapacitated for 6 months and in order for you to continue working, you incurred and paid for employment-related expenses of $450 for each month of his incapacity ($200 for household services and $250 for dependent care).

Your father had $1,266 adjusted gross income for the year and received a nontaxable disability payment of $55 for each month of disability.

Household expenses	$250
Add: Child care outside home ($300 but limited to maximum for 1 child)	200
Total expenses	$450
Allowable deduction for the month (Maximum)	$400

Example 2: Adjusted Gross Income Adjustment

You are married. With your spouse you maintain a household that includes 2 preschool dependent children. Both you and your husband, or wife, are gainfully employed full time. You file a joint Form 1040 with $19,200 adjusted gross income for the tax year and you itemize your deductions.

During a month you incur and pay employment-related expenses of $450 for a housekeeper who cares for your preschool children in your home and also does your cleaning, laundry, and some cooking.

Your deduction is computed as follows:

Household/child care in the home ($450, but limited to maximum)	$400
Reduction required for excess over $18,000 adjusted gross income ($19,200 − $18,000 = 1,200 ÷ 24)	50
Allowable deduction for the month	$350

Example 3: Disabled Dependent Care in your Home

You are single, gainfully employed full time maintain a household for . . .

Your deduction is computed as follows.

Household services		$ 200
Dependent care expense		250
Total employment related expenses		$ 450
Amount of reduction		
Dependent's adjusted gross income	$1,266	
Disability payment (6 × $55)	330	
Total	$1,596	
Less	750	
Balance	$ 846	
Allocation for each month in which employment related expenses are incurred ($846 ÷ 6)		141
Allowable deduction for each month		$ 309
Total deduction for the year ($309 × 6)		$1,854

If instead, your employment-related expenses included $350 for household services, the other circumstances being the same as above, your computation would be as follows:

Total employment related expenses	$600
Reduction required	141
Reduced expenses	$459
Allowable deduction for month (maximum)	$400
Total deduction for the year ($400 × 6)	$2,400

However, if your adjusted gross income was $19,200 for the tax year (see Example 2), and other facts were the same as immediately above, you would further reduce the above deduction by one-half the excess over $18,000:

Allowable deductions for month (maximum)	$400

However, if your adjusted gross income was $19,200 for the tax year (see Example 2), and other facts were the same as above, you would further reduce the above by one-half the excess over $18,000:

Maximum allowable deduction (from above)	$400
Reduction required (19,200 − 18,000 ($1200) ÷ 24)	50
Allowable deductions for month	$350

Example 4: Disabled Spouse Care in Your Home, Period of Less Than a Month.

You are married. Both you and your wife are gainfully employed full time except for the period described below. You maintain a household for yourself and your wife, file a joint Form 1040 with adjusted gross income of less than $18,000 for the tax year, and itemize your deductions. Your wife had an accident which rendered her incapable of self-care for a three week period during one month of the tax year. She received a gift of $25 and a nontaxable disability payment of $150.

To enable you to continue working, you hired and paid a maid at $75 for a 5 day week to look after your wife's needs, prepare her lunch and dinner, and do household chores as time permitted.

Maximum allowable deduction per month (from above)	$400
Reduction required: $19,200 − 18,000 = $1,200; $1,200 ÷ 24	50
Allowable deduction for each month	$350

Note: As indicated under *Qualifying Individuals* above, if the dependent for whom you incurred employment related expenses was disabled for only part of a month, the total employment related expenses would be limited to those expenses incurred in that part of the month.

Your deduction for June is a computed as follows:

June 15 and 16 (2/5 of $250)	$100	
June 19 through 30 (2 times $250)	500	
Total spouse care expenses	$600	
Deduct wife's disability payment ($75 + $75 + $150 ÷ 3)	50	
Net spouse care expense (treating part month as whole)	$550	
Allowable deduction for June (Maximum)		$400

Your deduction for July is computed as follows:

July 3 through 13 (2 times $250)	$500	
July 17 through 31 (2 1/5 times $75)	$165	
Total spouse care expense	665	
Deduct wife's disability payment	50	
Net spouse care expense	615	
Allowable deductions for July (Maximum)		$400

Your deduction for August is computed as follows:

August 1 through 4 (4/5 of $75) Balance	$60	
August 7 through 11	75	
Total spouse care expense	135	
Deduct wife's disability payment	50	
Net spouse care expense	$85	
Allowable deductions for August		$85
Total deductions for the tax year		$885

FRIDAY, MARCH 1, 1974

319 (C.A. 7, 1953); see *First Nat. Bank of Chicago* v. *Commissioner*, 255 F. 2d 759 (C.A. 7, 1958), affirming sub nom. *Marva Trotter Barrow Spaulding*, 27 T.C. 479 (1956).

Under the reorganization agreement, Cap & Gown transferred its assets, its business, and its right to tax refunds, and in return, Cenco transferred valuable stock to Cap & Gown. Such transfers were made at arm's length, and it appears that Cap & Gown received adequate consideration for what it transferred. Nevertheless, there is a question as to what Cap & Gown transferred when it transferred its right to tax refunds and what the petitioner thereby acquired. Cap & Gown could not transfer a right to a refund to which it was not entitled; it must have intended to transfer only that to which it had a legal claim. No doubt the petitioner could not have expected to have acquired more of a refund than that to which Cap & Gown was entitled. Surely, the parties did not intend to provide that in the event the respondent recovered $299,785 of the refund from Cap & Gown, the petitioner should continue to hold the entire $680,732 which had been paid to it. Thus, it seems clear to us that Cap & Gown intended to transfer only the refund to which it was entitled and that the petitioner acquired only such right to a refund. Any excess paid to the petitioner was therefore not bargained for, was merely a windfall, and no consideration was given for it. Of course, it may turn out that the respondent is not entitled to recover the entire refund claimed by him, or any portion thereof, and in that event, the petitioner will be entitled to retain all of the refund which under law belongs to it as transferee of the right of Cap & Gown. We hold that the petitioner is liable as a transferee in equity as to any portion of the refund which exceeds the amount to which it is entitled under law, plus interest as provided by law.

The parties are directed to move or otherwise act with respect to further proceedings in this case on or before February 14, 1973.

THOMAS J. GREEN, JR., AND ELLEN S. GREEN, PETITIONERS v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 7407-70. Filed December 20, 1972.

An employee, who maintained a den in his Long Island residence where he chose for reasons of personal convenience to do work for his employer in the evenings, deducted automobile expenses incurred in driving between his home and his Manhattan office, stopping first at various clients' Manhattan offices. *Held*, petitioner's transportation expenses between his Long Island home and his Manhattan clients' offices and return were nondeductible commuting expenses.

Gabriel T. Pap, for the petitioners.
Michael K. Phalin, for the respondent.

HALL, *Judge:* The Commissioner determined a $406.33 deficiency in petitioners' 1967 Federal income tax.

The sole issue is whether automobile expenses incurred by Thomas J. Green, Jr. (petitioner), in driving between his Long Island residence and his Manhattan business office via various clients' Manhattan offices on 80 specific days in 1967 are deductible business expenses.[1]

FINDINGS OF FACT

All of the facts have been stipulated, and the stipulation of facts and exhibits attached thereto are incorporated herein by reference.

Petitioners are husband and wife, and resided in Port Washington, Long Island, New York, at the time they filed their petition. They filed a joint 1967 Federal income tax return with the district director of internal revenue, Manhattan, New York.[2]

During 1967 petitioner was employed by the American Broadcasting Co. (ABC) as a salesman of television time. His business office was located in Manhattan, the principal place of business of ABC. His sales territory was the New York City metropolitan area.

Petitioner owned and lived in a seven-room house in Port Washington. In this house was a den where petitioner spent time in the evening reviewing his notes of the day's business activities, studying television rating material, reviewing television advertisements of ABC and its competitors, and making plans for his next day's business activities.[3] Petitioner's reasons for doing some of his work at home rather than at his regular office were purely personal in nature.

Petitioner traveled from his home to his Manhattan office by train one-fifth of the time and by private automobile four-fifths of the time during 1967. The distance between petitioner's home and his office is 25 miles. On the 80 specific days in issue petitioner drove to Manhattan, stopping to make a business visit at a Manhattan client's office before reporting to his own Manhattan office. The offices of such clients were located within 1 mile of petitioner's Manhattan office.

Petitioner has not demonstrated what portion of the automobile expenses he claims as a deduction is attributable to trips within Manhattan between his clients' offices and petitioner's Manhattan office.

OPINION

Section 162 provides a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any

[1] Other issues have been settled by stipulation of the parties.
[2] E. S. Green is a party to this action solely because a joint income tax return was filed.
[3] The parties agree that petitioner is entitled to deduct as a business expense $144.23 in 1967 representing the rental value of this den.

trade or business."[4] Section 262 disallows any deduction for "personal, living, or family expenses" except as otherwise expressly provided in the Internal Revenue Code. Commuting expenses are nondeductible personal expenses. Sec. 1.162–2(e), Income Tax Regs.

Petitioner contends that the expense of the 80 round trips between his Long Island residence and his Manhattan business office or Manhattan clients' offices is a deductible business expense on the grounds that he has two places of work, the den in his home and his office in Manhattan with his employer, and travel between them is not commuting. Respondent argues that the travel expenses at issue are nondeductible commuting costs. We agree with respondent.

Petitioner, rather literalistically, contends that if his den is a "place of business" within the meaning of the regulations under section 262 [5] (and it is conceded that it is), then the den must also be a "place" at which "you work" within the meaning of the Internal Revenue Service publication entitled "Your Federal Income Tax."[6] Asserting his reliance on this publication, petitioner concludes that he may properly deduct the expense of proceeding daily from his den to his clients' Manhattan offices and back. We cannot agree with petitioner's theory which would, if accepted, facilitate ready evasion of the well-settled rule of law barring deduction of commuting expenses.

In the first place, even if Your Federal Income Tax were construed to permit deduction of what would otherwise be nondeductible commuting expenses, it is clear that the sources of authoritative law in the tax field are the statute and regulations, and not informal publications such as Your Federal Income Tax. *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Adler* v. *Commissioner*, 330 F. 2d 91, 93 (C.A. 9, 1964); *Eugene A. Carter*, 51 T.C. 932, 935 (1969).

Secondly, petitioner's argument places excessive reliance on the few words he selects from Your Federal Income Tax, and ignores the clear purport of the booklet as a whole. Your Federal Income Tax, *supra* at 45, makes it quite clear that commuting expenses are nondeductible. There would be no vitality to this principle if it could be avoided by the ready expedient of voluntarily doing some evening homework before proceeding to the office the following day.

[4] All statutory references, unless otherwise indicated, are to the Internal Revenue Code of 1954, as amended.

[5] Sec. 1.262–1(b)(3), Income Tax Regs., states: "Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense."

[6] Your Federal Income Tax, 1968 ed. for individuals, states at p. 45, "If you worked at two places in one day whether or not for the same employer, you may deduct the expense of getting from one place to the other."

(456)

The terms "place of business" and "place" at which "you work" are not words of art, and petitioner's reliance on their apparent verbal equivalence is overly simplistic. As Mr. Justice Holmes stated in *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

We have no hesitancy in holding that whether or not petitioner's den was a "place of business" within the meaning of the regulations under section 262, it was not a place of work within the meaning of Your Federal Income Tax. For a personal residence to be a place of work for purposes of avoiding the prohibition on deduction of commuting expenses, it must at the least be a "principal office."[7] By no stretch of the imagination could petitioner's den be appropriately so described.

Petitioner's principal place of work is his office located at ABC's Manhattan headquarters. The offices of his clients within his New York metropolitan area sales territory are also places of work, and he is entitled to deduct the expense of traveling from his Manhattan office to his clients' offices and back. However, he is not entitled to deduct his commuting expenses from his Long Island home to his Manhattan office or his Manhattan clients' offices and return. Petitioner chose to live in Port Washington for personal reasons and commuting expenses between Port Washington and Manhattan are nondeductible personal expenses. *Commissioner* v. *Flowers*, 326 U.S. 465, 473 (1946). See *Steinhort* v. *Commissioner*, 335 F. 2d 496 (C.A. 5, 1964).

Petitioner has not proven that he was required by his employer or otherwise to have a den in his Long Island home, that he would have been unable to perform the same work at his principal business office, or that the den was maintained where it was for any reason other than petitioner's personal preference and convenience. Petitioner has the burden of proof on such matters, and no evidence thereon has been introduced. Therefore, we find that petitioner's reasons for doing some of his work at home rather than at his regular office were purely personal in nature.

The mere fact that petitioner for personal reasons voluntarily chose to do some of his employer's work at his home did not convert his home to his first and last place of work on each of the 80 days in issue. As we stated in *Julio S. Mazzotta*, 57 T.C. 427 (1971), affirmed per curiam 465 F. 2d 1399 (C.A. 2, 1972), at page 429:

Because petitioner's secondary place of employment is his personal residence, petitioner argues that the cost of traveling to his residence in the evening is deductible. Petitioner's logic presents us with a paradox: When he is at his re[sidence]

[7] See *Julio S. Mazzotta*, 57 T.C. 427 (1971), affirmed per curiam 465 F. 2d 1399 (C.A. 2, 1972).

payment is due to negligence or intentional disregard of rules and regulations.

The petitioner's 1961 and 1964 income tax returns were prepared by its accountant and fully disclosed receipt of sums in respect of the involuntary conversion of the realty. The accountant was experienced in tax matters, and the evidence indicates that the petitioner relied in good faith on his advice. In these circumstances, we find that the underpayment of income tax was not due to the petitioner's negligence or intentional disregard of rules and regulations. *Brockman Building Corporation*, 21 T.C. 175, 191 (1953), affd. 231 F. 2d 145 (C.A. 9, 1955), certiorari denied 350 U.S. 936 (1956); *R. E. Nelson*, 19 T.C. 575, 581 (1952); *Davis Regulator Co.*, 36 B.T.A. 437, 444 (1937).

The petitioner in its brief contends that if the respondent's deficiency for the year 1961 is sustained, it should be allowed to deduct $2,225.94 for real property taxes and $680.02 for interest in computing its 1961 taxable income. We have found that these sums were paid out of the $81,900 partial payment received in July 1961. However, no evidence was introduced at the trial to indicate that these expenses were properly deductible by the petitioner; and if they were deductible, it has not been established that 1961 is the proper year for deduction. To establish when such items were deductible, the petitioner must show the method of accounting employed for tax purposes and also the year in which the expense items were either accrued or paid. Although some evidence indicates that these expenses were paid in 1961, it is not clear whether the petitioner is a cash or accrual method taxpayer. No evidence has been presented on the question of when the expense items were accruable. Accordingly, there is no basis to grant the requested adjustments.

Decision will be entered under Rule 50.

HARRY D. ALDRIDGE AND VIRGIL ALDRIDGE, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 6447-66. Filed December 24, 1968.

Property of petitioners was condemned in 1963 and the condemnor deposited the amount of the initial award, as determined by a Kentucky county court, with the clerk of the court. Petitioners appealed the award amount and did not obtain the deposit until the litigation was settled in 1965, at which time payment to them was made. Kentucky law specified that withdrawal of the deposit would not prejudice petitioners' appeal but that they would be required to pay interest to the condemnor on any amount withdrawn in excess of the amount finally determined on appeal. *Held*, petitioners constructively received the amount deposited in 1963.

dence, he is not at "home" but at work. We can resolve this tax problem without trying to solve petitioner's conundrum. The primary motivation for petitioner's trips from his major place of employment to his residence was personal. The primary purpose for these trips was to be home (in the popular sense of the term). We do not believe petitioner's statement that he would not have returned to his residence each evening had he not conducted business there.

Petitioner, more candid than petitioner in *Mazzotta*, concedes in his reply brief that he would have returned to his residence each evening to enjoy his family and eat his supper even if he had not planned to work in his den at night.

Moreover, respondent is not inconsistent in allowing petitioner to deduct the fair rental value of his den as an ordinary and necessary business expense while at the same time denying that the den in his home is his first and last place of work each day. Petitioner's position is "not essentially different from that of other taxpayers, particularly those engaged in the professions, who, for personal reasons sufficient to themselves, prefer to live in the suburbs and maintain limited personal office or shop facilities in their residence, but who commute daily to their principal place of employment in the city." *Smith v. Warren*, 388 F. 2d 671, 673 (C.A. 9, 1968).

The fact that petitioner's first stop is at the Manhattan office of a client does not transform commuting into a business trip to the extent the distance traveled does not exceed the distance from his home to his Manhattan office, but he is entitled to deduct the travel from his client's Manhattan office to his own Manhattan office. The general rule was set out in Rev. Rul. 55-109, 1955-1 C.B. 263, as follows:

> Where an employee having only *one* employer is required to work part of the same day at each of two different locations within the same city, it is clear that he must make a business trip which is directly attributable to the actual performance of his duties, and that his necessary transportation expenses in going from his first to his second place of employment would generally be deductible. If he has to return to his first place of employment during that same day, his return trip would also be directly connected with the business and his return transportation expenses would likewise be deductible. However, if at the end of his workday he goes home directly from his second place of employment, his trip would ordinarily be regarded as commuting and his transportation expenses would be nondeductible, at least in those situations where his transportation expenses in going from that location to his home do not exceed those from his headquarters office to his home.

The distance between petitioner's clients' offices and his office in Manhattan has been stipulated to be no more than 1 mile. This is the only evidence available to the Court. Petitioner has failed to prove how many total miles these trips represent, and the Court has no adequate basis for making an estimate. Therefore, no part of the expense in issue will be allowed.

Decision will be entered under Rule 50.

James E. Banahan, for the petitioners.
Frederick W. Krieg, for the respondent.

TANNENWALD, *Judge:* Respondent determined a deficiency of $1,879.86 in petitioners' income taxes for the taxable year ending December 31, 1963. In light of certain concessions by petitioners, the only remaining issue is whether petitioners constructively received $13,600 in 1963.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioners, husband and wife, had their legal residence in Nicholasville, Ky., at the time they filed the petition herein. They filed a joint income tax return on the cash basis for the calendar year 1963 with the district director of internal revenue in Louisville, Ky.

During 1963, the Department of Highways of the Commonwealth of Kentucky (hereinafter sometimes referred to as the condemnor) sought to acquire unimproved land owned by petitioners for a highway. In November 1963, condemnation proceedings were begun in the Fayette County Court, Lexington, Ky. (hereinafter referred to as the County Court). Petitioners' cost basis in the parcel involved (hereinafter referred to as the condemned land) was $2,814.38.

The County Court appointed appraisers, who reported to the court that the condemned land had a value of $13,600, that the damages to the adjacent land owned by petitioners were $16,350, and that a temporary easement needed by the condemnor had a value of $50.[1] On November 26, 1963, the condemnor deposited the total amount, $30,000, with the clerk of the County Court.

Petitioners filed an answer in the condemnation action, challenging the necessity of the condemnation and the condemnor's authority therefor. On December 16, 1963, the County Court handed down a judgment which held that the condemnation was proper under section 177.081 of the Kentucky Revised Statutes, that the report of the commissioners (appraisers) conformed to the provisions of Kentucky law, that the condemnor could take possession of the land upon the payment of costs of the action and of the $30,000 award to petitioners or the clerk of the court, and that petitioners should vacate the land and deliver possession to the condemnor upon payment of the $30,000 award. The prior deposit of $30,000 made by the condemnor constituted compliance with the payment provisions specified in the judgment.

By virtue of the provisions of section 177.087 of the Kentucky Revised Statutes, both the condemnor and petitioners had 30 days, from

[1] These latter two amounts do not present any issue herein.

and after December 16, 1963, in which to file an appeal from the judgment of the County Court.

On January 10, 1964, petitioners filed an appeal, limited solely to the amount of the award, with the Fayette Circuit Court. After a series of negotiations, the condemnor agreed in November 1965 to a total payment of $35,000. An agreed order of settlement was obtained from the Fayette Circuit Court, which directed the clerk of the County Court to pay over the $30,000 deposit to the petitioners, the condemnor to pay over another $5,000, and the petitioners to execute and deliver a deed to the property to the condemnor.

At no time prior to this order of settlement had the petitioners ever attempted to withdraw the $30,000 deposited with the clerk of the County Court. Petitioner Harry D. Aldridge felt that to withdraw the deposit while the appeal was pending would jeopardize his chance of obtaining more than $30,000. In December 1965, petitioners were paid the $30,000 deposit under the settlement order. In the same month, they executed a deed to the condemned property and delivered it to the condemnor. In January 1966, the condemnor paid them the final $5,000.

Petitioners were not allowed to use the condemned land after the judgment of December 16, 1963, but the condemnor did not take actual possession until 1966.

In May 1965, petitioners replaced the condemned land. Respondent has conceded that the property thus purchased was "similar or related in service or use" to the condemned property.

Petitioners' 1963 Federal income tax return did not include in gross income any amount attributable to the condemnation of the property and in no way reported the condemnation. Petitioners' 1965 Federal income tax return reported the condemnation and recited an election "to postpone recognition of any gain since a new farm was acquired in 1965 to replace existing farm."

On July 14, 1966, petitioners requested that the district director of internal revenue grant them a retroactive extension of the period during which property could be replaced under section 1033, I.R.C. 1954. On August 9, 1966, this request was denied.

OPINION

It is conceded that petitioners have, with one exception, complied with the provisions of section 1033 [2] regarding the nonrecognition of gain from the involuntary conversion of property. The exception relates to the question whether the replacement of the condemned property in May 1965 was accomplished within "one year after the close

[2] All references herein are to the Internal Revenue Code of 1954.

of the first taxable year in which any part of the gain upon the conversion is realized." Sec. 1033(a)(3)(B)(i).[3] If petitioners realized gain in 1963, they are taxable thereon in 1963, since the replacement did not occur within the prescribed period.

Petitioners' land was the subject of condemnation proceedings. On December 16, 1963, a County Court in Kentucky handed down its judgment that the land was the proper subject of condemnation and that petitioners should receive $30,000 compensation therefor. The condemnor (the Department of Highways of the Commonwealth of Kentucky) was authorized to take possession of the land upon the payment of the $30,000 either to petitioners or to the clerk of the court. It had deposited that sum with said clerk on November 26, 1963, and this deposit complied with the payment provisions of the judgment. Both parties had 30 days from the entry of judgment to file an appeal and, on January 10, 1964, petitioners did appeal. Subsequent negotiations resulted in a settlement of the condemnation proceedings in November 1965 at an increased amount of $35,000. At no time prior to the settlement did petitioners attempt to withdraw the $30,000. From and after December 16, 1963, petitioners were not allowed to use the land, but the condemnor did not take actual possession until 1966. Petitioners withdrew the $30,000 deposit in December 1965 and executed a deed of the land at about the same time. The remaining $5,000 was paid to them in January 1966.

The condemnation was carried out under sections 177.081 through 177.089 of the Kentucky Revised Statutes Annotated, the pertinent provisions of which are as follows:[4]

177.087 Time for filing and proceedings upon appeals to the circuit court and Court of Appeals.

* * * * * * *

(4) The payment by the condemnor of the amount of compensation awarded and the taking possession of the lands and material condemned shall not prejudice its right to appeal from the judgment of any court, nor shall the acceptance by the owner of the amount of the compensation awarded prejudice his right to appeal from the judgment of any court.

(5) If the condemnor takes possession of the land and material condemned and the amount of compensation is thereafter increased upon an appeal, the condemnor shall pay interest to the owner at the rate of six percent per annum upon the amount of such increase from the date the condemnor took possession of the land and material. If the condemnor takes possession of the land and material condemned and the amount of compensation is thereafter decreased

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[3] Petitioners make no claim that their time to replace the condemned property was extended by respondent or that respondent's refusal to grant their 1966 application for an extension of time was arbitrary or otherwise unwarranted. See sec. 1.1033(a)-2(c)(3), Income Tax Regs.; cf. *Boyce v. United States*, 405 F. 2d 526 (Ct. Cl. 1968).

[4] All Kentucky statutory references are to Ky. Rev. Stat. Ann. (Baldwin's, 3d ed., 1963, including 1968 Supp.).

upon an appeal, the condemnor shall be entitled to a personal judgment against the owner for the amount of the decrease plus interest at the rate of six percent per annum from the date the owner accepted the amount of compensation the condemnor paid into Court or to the owner. If the owner at all times refuses to accept the payment tendered by the condemnor, no interest shall be allowed in the judgment against the owner for the amount of the decrease.

177.088 Payment of compensation into court.

All money paid into Court or paid or transferred to the Clerk of a Court under the provisions of KRS 177.081 to 177.089 shall be received by the Clerk of the Court and held subject to the order of the Court, for which the Clerk and his sureties on his official bond shall be responsible to the persons entitled thereto.

Against the foregoing background, petitioners argue that, as cash basis taxpayers, their right to the funds on deposit with the clerk of the County Court was subject to substantial limitation or restriction so that the funds were not constructively received by them in 1963. Respondent contends that petitioners could have drawn the entire $30,000 [5] in December 1963 so that they should be held constructively to have received that amount in that year.[6] We have concluded that respondent's position should be sustained.

Petitioners make a two-pronged argument against a holding of constructive receipt in 1963. The first prong is that if they had withdrawn the deposit, they might have been required, upon an appeal, to repay all or a portion of the same with interest by virtue of section 177.087(5) of the Kentucky Revised Statutes Annotated, *supra*. This assertion is clearly without merit. Any withdrawal would have been under a claim of right, and the potential obligation to repay its equivalent in a later year is not sufficient to defeat a claim of current taxability. *North American Oil* v. *Burnet*, 286 U.S. 417 (1932). Their mere failure to withdraw makes no difference to their claim of right. *Anderson* v. *Bowers*, 170 F. 2d 676 (C.A. 4, 1948); *Commissioner* v. *Brooklyn Union Gas Co.*, 62 F. 2d 505 (C.A. 2, 1933), affirming 22 B.T.A. 507 (1931); *Penn* v. *Robertson*, 115 F. 2d 167 (C.A. 4, 1940). The fact that, by withdrawing the deposited award, petitioners would be required to pay interest if the award was reduced on appeal does not require a different conclusion. Perhaps the avoidance of liability for interest by not withdrawing the funds (see sec. 177.087(5), Ky. Rev. Stat. Ann., *supra*) may have provided a motive for leaving the deposit in court. But the obligation was contingent

[5] See fn. 1, *supra*.

[6] Income Tax Regs.:

Sec. 1.451-2 Constructive receipt of income.

(a) *General rule*. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitation or restrictions. * * *

upon an appeal being taken by the condemnor (which might not occur),[7] would attach to only a portion and not all of the deposit, and represented no more than a normal payment for the use of money which a condemnee had put to work for his own benefit.[8]

Nor are we impressed with petitioners' claim that a withdrawal by them should be analogized to a loan in the nature of an advance payment on an executory contract to sell which might have been called off because of nonoccurrence of conditions subsequent. Cf. *Daniel Rosenthal*, 32 T.C. 225 (1959). Under Kentucky law, it appears that the judgment of the County Court and the payment to the clerk of that court operated to prevent any subsequent abandonment by the condemnor (even though it had not taken possession) and to assure petitioners that they would be compensated for their land. *Patrick* v. *Kentucky Farm Bureau Mutual Ins. Co.*, 413 S.W. 2d 340, 343, (Ky. 1967); cf. *Commonwealth* v. *Fultz*, 360 S.W. 2d 216 (Ky. 1962); *Potter* v. *Wallace*, 185 Ky. 528, 215 S.W. 538 (1919); see *Manion* v. *Louisville, St. L. & T. Ry. Co.*, 90 Ky. 491, 494, 495, 14 S.W. 532, 533, (1890); but see *Shelton* v. *Webster County Soil Cons. District*, 377 S.W. 2d 81, 85 (Ky. 1964). Compare *General Bakery Co.*, 48 T.C. 201 (1967). Even though title may not have been technically transferred until 1965 when the condemnor received a deed, the right to possession of the land passed to the condemnor to the exclusion of the petitioners by virtue of the judgment of the County Court and the payment to the clerk thereof in 1963. *Patrick* v. *Kentucky Farm Bureau Mutual Ins. Co.*, *supra*. The transaction is thus more comparable to a contract of sale where the benefits and burdens have passed to the purchaser. Cf. *Wiseman* v. *Scruggs*, 281 F. 2d 900 (C.A. 10, 1960); *Consolidated Gas & Equipment Co. of America*, 36 T.C. 675, 684 (1961); *Ottilie B. Kuehner*, 20 T.C. 875 (1953); *Standard Lumber Co.*, 28 B.T.A. 352 (1933).[9]

The second prong of petitioners' argument is that they had no right to immediate payment of the deposited award in 1963 and, therefore, there was no constructive receipt in that year. *North American Oil Consolidated* v. *Burnet*, *supra*. Petitioners properly disavow any argument based upon the proposition that withdrawal of the

[7] If only the condemnor appealed, the appraisers' award would act as a ceiling on the final award. *Commonwealth, Department of Highways* v. *Parsons*, 383 S.W. 2d 360 (Ky. 1964). If only the petitioners appealed, the appraisers' award would act as a floor. *Commonwealth of Kentucky, Department of Highways* v. *C. S. Brent Seed Co.*, 376 S.W. 2d 310 (Ky. 1964).

[8] Whether the existence of an obligation to repay a substantial amount (e.g., as a penalty) in addition to the funds withdrawn might constitute a significant restriction, we do not now decide.

[9] Petitioners have made no argument based on a lack of authority in the condemnor, a question which they had originally raised in the County Court proceeding and which was still capable of being put in issue on appeal. In this connection, we note that petitioners in fact did not raise this issue in their appeal.

deposit would have prejudiced their right of appeal. See sec. 177.087, Ky. Rev. Stat. Ann., *supra;* cf. *William Parris*, 20 B.T.A. 320 (1930). Their assertion is based upon section 177.088 of the Kentucky Revised Statutes, *supra*, which specifies that money paid to the clerk shall be "held subject to the order of the Court." But it does not follow from this provision that petitioners' right to withdraw the money was subject to any limitation or restriction which effectively impaired their ability to obtain the funds upon demand. Here again we must look to Kentucky law and practice to determine petitioners' rights of withdrawal, since rights in the eminent-domain arena are dependent upon the statutory provisions of the particular State. See *Patrick* v. *Kentucky Farm Bureau Mutual Ins. Co., supra* at 343. We have received no enlightment from the parties and our own efforts at self-enlightment have not uncovered any statutory provisions, reported cases, or published rules dealing directly with this point. We do know, however, that the Kentucky constitution requires just compensation be paid to a property owner before a taking. Ky. Const., secs. 13 and 242. Accord, *Barker* v. *Lannert*, 310 Ky. 843, 222 S.W. 659 (1949); and the Kentucky courts have shown a predilection to construe these provisions as demanding prior actual payment or the equivalent thereof. *Long Fork Ry. Co.* v. *Sizemore*, 184 Ky. 54, 211 S.W. 193 (1919); *Asher* v. *Louisville & N. R. Co.*, 87 Ky. 391, 8 S.W. 851 (1888); *Covington S. R. T. Ry. Co.* v. *Piel*, 87 Ky. 267, 8 S.W. 419 (1888). In view of the fact that section 177.086 of the Kentucky Revised Statutes authorized the taking of possession upon payment of the commissioner's award either "to the owner or the clerk of the Court," we conclude that the payment by the condemnor herein was in effect a continuing tender of payment to petitioners which petitioners could have received at any time.

Petitioners contend that their proof of the statutory provision requiring that the award deposit be held subject to court order is sufficient to shift to the respondent the burden of proof as to the absence of any limitation or restriction on payment. We disagree. We think it was incumbent upon petitioners to introduce some evidence of the general practice or procedure with respect to the manner in which that provision is applied. Alternatively, we think it essential that there be some published laws, rules, regulations, or decisions of which we could take judicial notice as to the meaning of the statute. We of course need not decide whether the burden of proof would have shifted if either of these conditions had been satisfied. We note also that there is no indication of conflicting claimants to the deposit which might have required further judicial proceedings under section 177.089 of the Kentucky Revised Statutes before petitioners' share could be fixed. Cf. *Estate of Dick W. Paul*, 11 T.C. 148 (1948).

In short, we have nothing either by way of evidence or by way of material of which judicial notice might have been taken, which would provide us with any basis upon which we could determine that petitioners' right of withdrawal was subject to sufficient limitation or restriction or would have subjected petitioners to such forfeiture of valuable rights as to justify the conclusion that the amount of $13,600 deposited herein as payment for the condemned land was not constructively received in 1963.

Petitioners' reliance on *Nitterhouse* v. *United States*, 207 F. 2d 618 (C.A. 3, 1953), and *Adolph K. Feinberg*, 45 T.C. 635 (1966), affd. 377 F. 2d 21 (C.A. 8, 1967), is misplaced. In *Nitterhouse*, the taxpayer was required to satisfy the court that he had clear title to the land as a condition precedent to payment. In *Feinberg*, the question was whether the taxpayer realized gain on the date of his actual withdrawal of the deposited funds. Realization through constructive receipt prior to that time was not in issue. Nor are *Patrick McGuirl, Inc.* v. *Commissioner*, 74 F. 2d 729 (C.A. 2, 1935), and *Driscoll Bros. & Co.* v. *United States*, 221 F. Supp. 603 (N.D.N.Y. 1963), in point. Both cases involved accrual basis taxpayers and are otherwise clearly distinguishable on their facts. Finally, even if petitioners are correct as to their interpretation of examples contained in respondent's publication entitled "Your Federal Income Tax," respondent is not precluded from asserting a contrary construction of section 1033 herein. *Adler* v. *Commissioner*, 330 F. 2d 91 (C.A. 9, 1964), affirming a Memorandum Opinion of this Court.

Under all the circumstances herein, we are forced to conclude that petitioners have failed to prove that they did not constructively receive the proceeds of the condemnation in 1963 and we accordingly sustain respondent's determination.

In order to reflect the conceded issues,

Decision will be entered under Rule 50.

FRANK A. LOGAN AND MARGARET S. LOGAN, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 2587-67. Filed December 26, 1968.

Petitioner sold his interest in a two man partnership to his partner and received cash for his share of unbilled work in progress and cash plus an assumption of his share of the partnership liabilities for his partnership interest. *Held*, the cash representing petitioner's share of work in progress was payment attributable to "unrealized receivables" and taxable as ordinary income under sec. 751(c), I.R.C. 1954. *Held, further*, petitioner's basis in his partnership interest determined.

Memorandum Findings of Fact and Opinion

FORRESTER, *Judge*: Respondent has determined a deficiency of $141 in petitioner's 1971 Federal income taxes. The only issue before us is whether petitioner may claim a dependency exemption for his mother, thus entitling him to head of household rates.

Findings of Fact

All of the facts have been stipulated and are so found.

Petitioner, Seymour H. Levinson, is a single individual who resided in Far Rockaway, New York, at the time he filed the petition in the instant case. He filed his 1971 calendar year Federal income tax return on the cash basis method of accounting with the district director of internal revenue, Brooklyn, New York.

During the year 1971, petitioner did not provide his mother, Lillian Levinson, with more than one-half of her support for that year.

On his Federal income tax return for 1971, petitioner claimed a dependency exemption for his mother and utilized the head of household rates in calculating his tax liability. Respondent, in his statutory notice of deficiency, determined that petitioner was entitled neither to an exemption for his mother, nor to the utilization of head of household rates.

Opinion

Petitioner concedes that because he did not provide more than one-half his mother's support in 1971, that he is not entitled to a dependency exemption for her under present sections 151 and 152.[1] Having conceded this, petitioner makes numerous constitutional attacks on these provisions in which he basically asks us to rewrite these provisions to allow him to claim an exemption.

Petitioner first argues that section 152 violates the due process requirement posited by the fifth amendment but such position has already been rejected by this Court. *Allen F. Labay* [Dec. 30,359], 55 T. C. 6, 14 (1970), affd. [71-2 USTC ¶ 9712] 450 F. 2d 280 (C. A. 5, 1971). We stand by our holding in *Labay* and reject petitioner's due process attack.

Petitioner's only other contentions embrace a general attack on the entire Code and its administration. He first argues that section 152 is unconstitutional because it is part of a Code which consistently violates the uniformity requirement of article I, section 8. Petitioner in essence argues that intrinsic rather than a mere geographic uniformity is required of the Internal Revenue Code. Again, however, this is an issue which has been definitely handled, and petitioner's position firmly rejected. *Brushaber v. Union Pac. R. R.* [1 USTC ¶ 4], 240 U. S. 1, 24 (1916); *Bromley v. McCaughn* [1 USTC ¶ 438], 280 U. S. 124, 138 (1929). Thus, we need not further consider this argument of petitioner.

Finally, petitioner asserts that his treatment by the Internal Revenue Service was highly arbitrary in that his return was selected at random for audit. The Internal Revenue Service, however, must handle millions of taxpayer returns each year, and even were its system of audit selection largely random, we could not find it unreasonable or arbitrary under such circumstances.

Because we have found that petitioner may not claim a dependency exemption for his mother, we must also hold that he is not entitled to claim head of household rates. Sec. 2(b).

Decision will be entered for the respondent.

[CCH Dec. 32,797(M)] Thomas A. and Jean E. O'Reilly v. Commissioner.

Docket No. 8627-72. T. C. Memo. 1974-261. Filed September 26, 1974. [Appealable, barring stipulation to the contrary, to CA-2.—CCH.]

[Code Secs. 162 and 214—Prior to amendment by P. L. 42-178 and effective before 1972]

Child care expenses: Limitations: Adjusted gross income test: Estoppel: Reliance on IRS employee's statement.—A husband and wife who both worked and whose adjusted gross income exceeded $6,600 could not deduct child-care expenses under the law in 1971. They were not entitled to rely on a statement made by an IRS employee over the telephone that such costs were deductible.—CCH.

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[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise specified.

Jean E. O'Reilly, *pro se*, 16 Broadway, Cornwall, N. Y. Robert E. Marum, for the respondent.

Memorandum Findings of Fact and Opinion

FORRESTER, *Judge*: Respondent has determined a deficiency of $120 in petitioners' 1971 Federal income taxes. The only issue for our decision is whether petitioners are entitled to deduct certain child-care expenses under either section 162 or section 214.[1]

Findings of Fact

Some of the facts have been stipulated and are so found.

Petitioners Thomas A. (Thomas) and Jean E. O'Reilly (Jean) are husband and wife who, at the time the petition herein was filed, resided in Cornwall, New York. They timely filed a joint Federal income tax return for the 1971 calendar year.

During 1971, Thomas was employed as an architect by Perkins and Will Service Co., Inc., of Chicago, Illinois. Jean, an interior designer, was employed by Rose, Beaton and Rose of White Plains, New York, on a full-time basis during January of 1971. The remainder of the year, except for a two-week period in early February during which she did not work, Jean was employed, again as an interior designer on a full-time basis, by James D. Lothrop, an architect in White Plains. Petitioners' combined adjusted gross income in 1971—all of which was earned in the jobs listed above—was $30,888.24.

During the 50 weeks in 1971 when Jean was employed, care of the petitioners' son, Patrick Jon, who became one-year old on July 7, 1971, was entrusted to Carmen Schelmety (Carmen), who charged the petitioners $30 a week for such service. Carmen watched Patrick Jon in her home, performing all the normal tasks required in looking after a child of that age. Carmen, however, performed no household or domestic-type services for petitioners during 1971. Patrick Jon was entirely supported by petitioners during 1971.

On March 8, 1972, Jean telephoned the Spring Valley Office of the Internal Revenue Service and was at that time told by some individual there that "any legitimate expense which allows one to earn taxable income" is deductible as a business expense. The identity or position of such individual, however, was not to be found in the record.

On their 1971 return, petitioners claimed a $1,500 deduction for the amounts paid Carmen for caring for Patrick Jon in 1971. In his statutory notice of deficiency respondent has disallowed such deduction in full.

Opinion

The only issue for our decision is whether petitioners are entitled to deduct child-care expenses incurred in order that they might be gainfully employed in 1971. Section 214, as it applied to 1971, allowed a deduction of up to $600 for the cost of caring for one child in order that his parents might be gainfully employed. Sec. 214(a), (b)(1)(A). However, in the case of working wives, the maximum allowable deduction is reduced dollar for dollar for each dollar by which the couple's adjusted gross income exceeds $6,000. Sec. 214(b)(2)(B). Thus, because petitioners' adjusted gross was well over $6,600, they are entitled to no deduction under section 214.[2]

As to the deduction of such expenses under section 162, it is clearly established that, except to the extent Congress provided in section 214, child-care expenses, even though incurred to allow the taxpayers to become gainfully employed, are nondeductible personal expenses. *Michael F. Nammack* [Dec. 31,002], 56 T. C. 1379, 1383-5 (1971), affirmed per curiam [72-1 USTC ¶ 9415] 459 F. 2d 1045 (C. A. 2, 1972), certiorari denied 409 U. S. 991 (1972); *William C. Smail, Jr.* [Dec. 32,097], 60 T. C. 719, 726, fn. 8 (1973), on appeal (C. A. 10, Nov. 16, 1973); *Henry C. Smith* [Dec. 10,911], 40 B. T. A. 1038 (1939), affirmed per curiam [40-2 USTC ¶ 9571] 113 F. 2d 114 (C. A. 2, 1940); *Mildred A. O'Connor* [Dec. 15,004], 6 T. C. 323 (1946). Accordingly, petitioners are entitled to no deduction under section 162 for the above-described child-care expenses.

Petitioners point out that Jean was told over the phone by an individual at an Internal Revenue Service office that deductions are permitted for any expense "which allows one to earn taxable income." Their attempts at an estoppel argument must fail, however, for, among other rea-

[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise specified.

[2] These provisions of section 214 were substantially amended for all tax years subsequent to 1971 by Pub. L. 92-178, sec. 210 (Dec. 10, 1971).

sons, it is clear that they could not have relied on the individual's advice—which was given on March 8, 1972—in incurring the expenses in 1971. *Cf. Mihran Demirjian* [Dec. 30,321], 54 T. C. 1691, 1701 (1970), *affd.* [72-1 USTC ¶ 9281] 457 F. 2d 1, 6 (C. A. 3, 1972). Nor did they demonstrate any authority in the individual to render such advice, much less come even close to making an argument that the Commissioner should be bound by the statements of this alleged employee.[3] See *Borrstein v. United States* [65-1 USTC ¶ 9421], 345 F. 2d 558, 562 (Ct. Cl. 1965); *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380, 384 (1947); section 601.201(k)(2), Proced. & Admin. Regs. It is clear to us that respondent, who has a rather broad discretion in correcting errors of law into which he may have fallen, *Automobile Club v. Commissioner* [57-1 USTC ¶ 9593], 353 U. S. 180 (1957), cannot be bound by the statement described above.

Decision will be entered for the respondent.

[CCH Dec. 32,799(M)] Harold Schudel and Paula J. Schudel v. Commissioner. Paul N. Goodmonson and Margaret Goodmonson v. Commissioner.

Docket Nos. 3065-73, 3140-73. T. C. Memo. 1974-262. Filed September 30, 1974. [Appealable, barring stipulation to the contrary, to CA-9.—CCH.]

[*Code Sec. 631(a)*]

Timber: Election to treat cutting as sale or exchange: Fair market value.—The fair market value of standing ornamental Christmas trees as of January 1 of the year of cutting was determined for purposes of computing gain under Code Sec. 631(a).—CCH.

William H. Kinsey, 1200 Standard Plaza, Portland, Ore., for the petitioners. Lee A. Kamp, for the respondent.

Memorandum Findings of Fact and Opinion

QUEALY, *Judge*: The Commissioner determined deficiencies in income tax for the taxable years 1967 to 1969, inclusive, as follows:

Docket No.	Petitioners	Year	Deficiency
3065-73	Harold Schudel and Paula J. Schudel..	1967	$8,277.00
		1968	6,691.00
		1969	4,570.00
3140-73	Paul N. Goodmonson and Margaret Goodmonson	1967	$1,773.00
		1968	2,631.00
		1969	3,778.00

The sole issue for decision in these cases relates to the determination of the fair market value as of January 1, 1967, 1968, and 1969 of Christmas trees sold by the petitioners during the years involved for the purpose of computing the gain realized in the cutting of such trees under section 631(a).[1] The cases were consolidated for trial, briefing, and opinion. Paula J. Schudel and Margaret Goodmonson are petitioners herein only to the extent of any interest which they may have by virtue of being the spouses, respectively, of Harold Schudel and Paul N. Goodmonson.

Findings of Fact

Some of the facts have been stipulated by the parties. Such facts and exhibits attached thereto are incorporated herein by this reference.

At the time of the filing of the petition in docket No. 3065-73, Harold and Paula J. Schudel, husband and wife, resided in Corvallis, Oregon.

At the time of the filing of the petition in docket No. 3140-73, Paul N. and Margaret Goodmonson, husband and wife, also resided in Corvallis, Oregon.

During the taxable years 1967, 1968, and 1969, Harold Schudel and Paul N. Goodmonson, both individually and as equal partners in a partnership doing business as Holiday Tree Farm (hereinafter collectively referred to as the "petitioners"), were engaged in the planting, cultivating, harvesting, and selling of Christmas trees.

The Christmas trees in question were predominantly Douglas Fir in species. Douglas Fir seedlings representing 2-year's growth are obtained from state or private nurseries. Such seedlings are planted in rows of between 1,200 and 1,700 seedlings per acre.

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[3] Furthermore, petitioners did not indicate to what question the individual was responding. Different phrasings of such question would have obvious effects on the interpretation to be accorded the answer given.

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

Memorandum Findings of Fact and Opinion

FORRESTER, *Judge*: Respondent has determined a deficiency of $141 in petitioner's 1971 Federal income taxes. The only issue before us is whether petitioner may claim a dependency exemption for his mother, thus entitling him to head of household rates.

Findings of Fact

All of the facts have been stipulated and are so found.

Petitioner, Seymour H. Levinson, is a single individual who resided in Far Rockaway, New York, at the time he filed the petition in the instant case. He filed his 1971 calendar year Federal income tax return on the cash basis method of accounting with the district director of internal revenue, Brooklyn, New York.

During the year 1971, petitioner did not provide his mother, Lillian Levinson, with more than one-half of her support for that year.

On his Federal income tax return for 1971, petitioner claimed a dependency exemption for his mother and utilized the head of household rates in calculating his tax liability. Respondent, in his statutory notice of deficiency, determined that petitioner was entitled neither to an exemption for his mother, nor to the utilization of head of household rates.

Opinion

Petitioner concedes that because he did not provide more than one-half his mother's support in 1971, that he is not entitled to a dependency exemption for her under present sections 151 and 152.[1] Having conceded this, petitioner makes numerous constitutional attacks on these provisions in which he basically asks us to rewrite these provisions to allow him to claim an exemption.

Petitioner first argues that section 152 violates the due process requirement posited by the fifth amendment but such position has already been rejected by this Court. *Allen F. Labay* [Dec. 30,359], 55 T. C. 6, 14 (1970), affd. [71-2 USTC ¶ 9712] 450 F. 2d 280 (C. A. 5, 1971). We stand by our holding in *Labay* and reject petitioner's due process attack.

Petitioner's only other contentions embrace a general attack on the entire Code and its administration. He first argues that section 152 is unconstitutional because it is part of a Code which consistently violates the uniformity requirement of article I, section 8. Petitioner in essence argues that intrinsic rather than a mere geographic uniformity is required of the Internal Revenue Code. Again, however, this is an issue which has been definitely handled, and petitioner's position firmly rejected. *Brushaber v. Union Pac. R. R.* [1 USTC ¶ 4], 240 U. S. 1, 24 (1916); *Bromley v. McCaughn* [1 USTC ¶ 438], 280 U. S. 124, 138 (1929). Thus, we need not further consider this argument of petitioner.

Finally, petitioner asserts that his treatment by the Internal Revenue Service was highly arbitrary in that his return was selected at random for audit. The Internal Revenue Service, however, must handle millions of taxpayer returns each year, and even were its system of audit selection largely random, we could not find it unreasonable or arbitrary under such circumstances.

Because we have found that petitioner may not claim a dependency exemption for his mother, we must also hold that he is not entitled to claim head of household rates. Sec. 2(b).

Decision will be entered for the respondent.

[CCH Dec. 32,797(M)] **Thomas A. and Jean E. O'Reilly v. Commissioner.** Docket No. 8627-72. T. C. Memo. 1974-261. Filed September 26, 1974. [Appealable, barring stipulation to the contrary, to CA-2.—CCH.]

[*Code Secs. 162 and 214—Prior to amendment by P. L. 92-178 and effective before 1972*]

Child care expenses: Limitations: Adjusted gross income test: Estoppel: Reliance on IRS employee's statement.—A husband and wife who both worked and whose adjusted gross income exceeded $6,600 could not deduct child-care expenses under the law in 1971. They were not entitled to rely on a statement made by an IRS employee over the telephone that such costs were deductible.—CCH.

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[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise specified.

Jean E. O'Reilly, *pro se*, 16 Broadway, Cornwall, N. Y. Robert E. Marum, for the respondent.

Memorandum Findings of Fact and Opinion

FORRESTER, Judge: Respondent has determined a deficiency of $120 in petitioners' 1971 Federal income taxes. The only issue for our decision is whether petitioners are entitled to deduct certain child-care expenses under either section 162 or section 214.[1]

Findings of Fact

Some of the facts have been stipulated and are so found.

Petitioners Thomas A. (Thomas) and Jean E. O'Reilly (Jean) are husband and wife who, at the time the petition herein was filed, resided in Cornwall, New York. They timely filed a joint Federal income tax return for the 1971 calendar year.

During 1971, Thomas was employed as an architect by Perkins and Will Service Co., Inc., of Chicago, Illinois. Jean, an interior designer, was employed by Rose, Beaton and Rose of White Plains, New York, on a full-time basis during January of 1971. The remainder of the year, except for a two-week period in early February during which she did not work, Jean was employed, again as an interior designer on a full-time basis, by James D. Lothrop, an architect in White Plains. Petitioners' combined adjusted gross income in 1971—all of which was earned in the jobs listed above—was $30,888.24.

During the 50 weeks in 1971 when Jean was employed, care of the petitioners' son, Patrick Jon, who became one-year old on July 7, 1971, was entrusted to Carmen Schelmety (Carmen), who charged the petitioners $30 a week for such service. Carmen watched Patrick Jon in her home, performing all the normal tasks required in looking after a child of that age. Carmen, however, performed no household or domestic-type services for petitioners during 1971. Patrick Jon was entirely supported by petitioners during 1971.

On March 8, 1972, Jean telephoned the Spring Valley Office of the Internal Revenue Service and was at that time told by some individual there that "any legitimate expense which allows one to earn taxable income" is deductible as a business expense. The identity or position of such individual, however, was not to be found in the record.

On their 1971 return, petitioners claimed a $1,500 deduction for the amounts paid Carmen for caring for Patrick Jon in 1971. In his statutory notice of deficiency respondent has disallowed such deduction in full.

Opinion

The only issue for our decision is whether petitioners are entitled to deduct child-care expenses incurred in order that they might be gainfully employed in 1971. Section 214, as it applied to 1971, allowed a deduction of up to $600 for the cost of caring for one child in order that his parents might be gainfully employed. Sec. 214(a), (b)(1)(A). However, in the case of working wives, the maximum allowable deduction is reduced dollar for dollar for each dollar by which the couple's adjusted gross income exceeds $6,000. Sec. 214(b)(2)(B). Thus, because petitioners' adjusted gross was well over $6,600, they are entitled to no deduction under section 214.[2]

As to the deduction of such expenses under section 162, it is clearly established that, except to the extent Congress provided in section 214, child-care expenses, even though incurred to allow the taxpayers to become gainfully employed, are nondeductible personal expenses. *Michael F. Nammack* [Dec. 31,092], 56 T. C. 1379, 1383-5 (1971), affirmed per curiam [72-1 USTC ¶ 9415] 459 F. 2d 1045 (C. A. 2, 1972), certiorari denied 409 U. S. 991 (1972); *William C. Smail, Jr.* [Dec. 32,097], 60 T. C. 719, 726, fn. 8 (1973), on appeal (C. A. 10, Nov. 16, 1973); *Henry C. Smith* [Dec. 10,911], 40 B. T. A. 1038 (1939), affirmed per curiam [40-2 USTC ¶ 9571] 113 F. 2d 114 (C. A. 2, 1940); *Mildred A. O'Connor* [Dec. 15,004], 6 T. C. 323 (1946). Accordingly, petitioners are entitled to no deduction under section 162 for the above-described child-care expenses.

Petitioners point out that Jean was told over the phone by an individual at an Internal Revenue Service office that deductions are permitted for any expense "which allows one to earn taxable income." Their attempts at an estoppel argument must fail, however, for, among other rea-

[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise specified.

[2] These provisions of section 214 were substantially amended for all tax years subsequent to 1971 by Pub. L. 92-178, sec. 210 (Dec. 10, 1971).

sons, it is clear that they could not have relied on the individual's advice—which was given on March 8, 1972—in incurring the expenses in 1971. *Cf. Minran Demirjian* [Dec. 30,321], 54 T. C. 1691, 1701 (1970), *affd.* [72-1 USTC ¶ 9281] 457 F. 2d 1, 6 (C. A. 3, 1972). Nor did they demonstrate any authority in the individual to render such advice, much less come even close to making an argument that the Commissioner should be bound by the statements of this alleged employee.[8] See *Borrstein v. United States* [65-1 USTC ¶ 9421], 345 F. 2d 558, 562 (Ct. Cl. 1965); *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380, 384 (1947); section 601.201(k)(2), Proced. & Admin. Regs. It is clear to us that respondent, who has a rather broad discretion in correcting errors of law into which he may have fallen, *Automobile Club v. Commissioner* [57-1 USTC ¶ 9593], 353 U. S. 180 (1957), cannot be bound by the statement described above.

Decision will be entered for the respondent.

[CCH Dec. 32,799(M)] **Harold Schudel and Paula J. Schudel v. Commissioner. Paul N. Goodmonson and Margaret Goodmonson v. Commissioner.**

Docket Nos. 3065-73, 3140-73. T. C. Memo. 1974-262. Filed September 30, 1974. [Appealable, barring stipulation to the contrary, to CA-9.—CCH.]

[Code Sec. 631(a)]

Timber: Election to treat cutting as sale or exchange: Fair market value.—The fair market value of standing ornamental Christmas trees as of January 1 of the year of cutting was determined for purposes of computing gain under Code Sec. 631(a).—CCH.

William H. Kinsey, 1200 Standard Plaza, Portland, Ore., for the petitioners. Lee A. Kamp, for the respondent.

Memorandum Findings of Fact and Opinion

QUEALY, *Judge*: The Commissioner determined deficiencies in income tax for the taxable years 1967 to 1969, inclusive, as follows:

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		1968	2,031.00
		1969	3,718.00

The sole issue for decision in these cases relates to the determination of the fair market value as of January 1, 1967, 1968, and 1969 of Christmas trees sold by the petitioners during the years involved for the purpose of computing the gain realized in the cutting of such trees under section 631(a).[1] The cases were consolidated for trial, briefing, and opinion. Paula J. Schudel and Margaret Goodmonson are petitioners herein only to the extent of any interest which they may have by virtue of being the spouses, respectively, of Harold Schudel and Paul N. Goodmonson.

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During the taxable years 1967, 1968, and 1969, Harold Schudel and Paul N. Goodmonson, both individually and as equal partners in a partnership doing business as Holiday Tree Farm (hereinafter collectively referred to as the "petitioners"), were engaged in the planting, cultivating, harvesting, and selling of Christmas trees.

The Christmas trees in question were predominantly Douglas Fir in species. Douglas Fir seedlings representing 2-year's growth are obtained from state or private nurseries. Such seedlings are planted in rows of between 1,200 and 1,700 seedlings per acre.

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[8] Furthermore, petitioners did not indicate to what question the individual was responding. Different phrasings of such question would have obvious effects on the interpretation to be accorded the answer given.

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

Egon and Ruth Radvany
Docket No. 76-4192

Certificate of Service

I have sent the brief and appendix to the Justice Department in Washington.

Ruth Radvany

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